(13)

Supreme Court of the United States

October Term, 1943.

No. 315.

NAT ROGAN, as United States Collector of Internal Revenue at Los Angeles, California,

Petitioner,

vs.

SAMSON TIRE & RUBBER CORPORATION, a Corporation,

Respondent.

RESPONDENT'S OPPOSING BRIEF.

PAUL H. ARTHUR,
of New York,
Rockefeller Center, 1230 6th Ave., New York,
Attorney for Respondent.

Of Counsel:

ERNEST S. WILLIAMS,
of Los Angeles.

Parker & Baird Company, Law Printers, Los Angeles

SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

Supreme Court of the United States

October Term, 1943.

No. 315.

NAT ROGAN, as United States Collector of Internal Revenue at Los Angeles, California,

Petitioner,

vs.

SAMSON TIRE & RUBBER CORPORATION, a Corporation,

Respondent.

RESPONDENT'S OPPOSING BRIEF.

(Emphasis indicated by italics herein is added.)

OPINION BELOW.

The District Court in deciding the case rendered or filed no opinion other than that judgment was for the defendant and against the plaintiff. (R. 39.)

The opinion of the Circuit Court of Appeals is reported at 136 F. 2d 345.

GROUNDS.

There are no special or important reasons existing in this case for a writ of certiorari. This case turns and was decided in the court below (C. C. A.) on *factual* issues pertaining exclusively to this case and arising out of facts peculiar to the respondent (original plaintiff).

Therefore, the decision of the Circuit Court of Appeals does *not:*

—conflict with the decision of any other circuit court of appeals;

—decide any question of local law in conflict with applicable local decisions, but *per contra* that decision is in accord with all California statutes and appellate decisions;

—decide any question of federal law which should be settled by this Court;

—decide a federal question in conflict with applicable decisions of this Court;

—depart from or sanction any departure from the accepted or usual course of judicial proceedings.

A brief statement of the facts including a short recital of the history of the Samson Tire & Rubber Corporation will bear out the above.

QUESTION.

Is the Samson Tire & Rubber Corporation a mere figment, or is it a substantial corporation and entitled to have its corporate entity and its corporate acts duly regarded and *not* held for naught?

STATEMENT.

The Samson tire and rubber business was organized at Los Angeles as an integral and independent enterprise in 1917. At that time a corporation known as Samson Tire *and* Rubber Corporation was organized under the laws of Delaware. (R. 102-3.) It sold its shares of stock, which were widely bought by the investing public, and established its factory at Compton in Los Angeles County.

Mr. A. Schleicher was the founder of the business and the organizer and the president of the corporation. Under his executive management the corporation entered into business and successfully conducted that business. (R. 106-8.) In 1928 the business was flourishing and it was decided to expand materially and in this connection to build a large new factory and plant modern in every respect to be located at Los Angeles. To accomplish this expansion program a new corporation known as the Samson Tire & Rubber Corporation (note that the form of the conjunction distinguishes the new from the old corporation, being *"and"* in the old corporate name and *"&"* in the new corporate name) was organized under the laws of Delaware. This new corporation had a large capitalization providing for both common and preferred shares, and for an issue of debentures in the authorized amount of $1,000,000.00. (R. 109-114; 156-166.) The assets, business and good will of the old corporation were transferred to the new corporation for shares of stock of the latter which shares were issued to the old corporation and by it in turn exchanged with its own stockholders for their shares of stock in the old corporation. The new corporation also assumed the liabilities of the old corporation. (R. 122-130.) In addition the new corporation sold and issued to the general investing public debentures in the amount of $1,000,000.00, and also shares of preferred and common stock. (R. 196-8.) By March, 1929, the new corporation had outstanding 165,010 shares of common stock of no par value, of which 100,000 shares had been issued for the assets of the old corporation, 5649 shares of preferred stock of the par value of $10.00 per share and $1,000,000.00 in debentures. (R. 180-2; 183-4; 185.)

The new corporation built at Los Angeles a large modern factory and administration building, and it continued in the operation of the business of manufacturing and selling tires and tubes, originally started in 1917. Mr. A. Schleicher was the president of the new corporation, and the business continued under his executive management. He was the individual responsible for its promotion and operation including this reorganization of 1928. (R. 114.)

Matters continued until the fall of 1930, when commencing in September communications were initiated between Mr. Schleicher representing the Samson Tire & Rubber Corporation and Mr. F. B. Davis, Jr., the president of and representing the United States Rubber Company wherein it was proposed that an offer should be made to the holders of the common stock (which was the voting stock) of the Samson Tire & Rubber Corporation to exchange their holdings of those common shares for shares of preferred stock and shares of Class B common stock of a new company to be organized in Delaware, subject to the approval of counsel for the United States Rubber Company and of counsel for the Samson Tire & Rubber Corporation, and that the United States Rubber Company should have the Samson Tire & Rubber Corporation manufacture in its plant at Los Angeles the tires and tubes to meet all of the requirements of the tire business of the United States Rubber Company and its subsidiaries on the Pacific Coast. It was anticipated that this large additional volume of production would cause the new factory of the Samson Tire & Rubber Corporation to operate at capacity and increase its manufacturing activities to a maximum, greatly to the advantage of the Samson Tire & Rubber Corporation, its debenture holders

and shareholders. The Samson Tire & Rubber Corporation was to continue to manufacture tires and tubes and to conduct its business under its present management. The proposals embraced other features, such as the purchase by the new company to be organized of 60,000 shares of the preferred stock of the Samson Tire & Rubber Corporation of the par value of $10.00 per share, theretofore unissued, for $600,000.00, which would enable the Samson Tire & Rubber Corporation to retire current bank loans, and such as the purchase by the United States Rubber Company or its nominee for $600,000.00 of 120,000 shares of the no par Class A common stock (which was the voting stock) of the new Delaware company to be organized and 50,000 shares of that new company's no par Class B common stock, and such as the guaranty by the United States Rubber Company for a period of five years of dividends at not exceeding 5% per annum on the preferred stock of the new Delaware company. The 50,000 shares of Class B common stock of the new Delaware company to be issued as aforesaid to the United States Rubber Company or its nominee were to be transferred to a trust for a profit sharing plan to be worked out for the benefit of the employees of the Samson Tire & Rubber Corporation. (R. 481-490; 506-8.)

The foregoing proposals were carried into effect. The new Delaware company was organized under the name of The Samson Corporation. A large majority of the common stockholders of the Samson Tire & Rubber Corporation promptly signified their willingness to exchange their common shares of the Samson Tire & Rubber Corporation for the preferred and the Class B common shares of The Samson Corporation and such exchange was carried out. A substantial minority of the common stock-

holders of the Samson Tire & Rubber Corporation, however, never did make the exchange of their common shares and continued to remain common stockholders of the Samson Tire & Rubber Corporation. (R. 185.)

The Samson Tire & Rubber Corporation continued the operation of its business. It commenced and continued to manufacture in large volume tires and tubes of the brands of the United States Rubber Company which the Samson Tire & Rubber Corporation shipped on a consignment basis to the United States Rubber Products, Incorporated, a subsidiary of the United States Rubber Company, which operated a large number of branches or stores throughout the Pacific Coast area from which it supplied the trade with tires and tubes of brands of the United States Rubber Company.

On December 31, 1929, the Samson Tire & Rubber Corporation owned assets in the total value of $5,134,-041.13. (R. 357-8.) These assets included land, buildings, machinery, equipment, inventories of raw materials and finished goods, supplies, intangibles and cash. All of these assets were the result of the business operations of the Samson Tire & Rubber Corporation and had been accumulated by it in the course of those operations since 1917. On December 31, 1931, the Samson Tire & Rubber Corporation owned assets in the total value of $5,433,-874.72, of which $1,566,119.86 was the equity of its common stockholders. (R. 364-6.) On May 31, 1932, the Samson Tire & Rubber Corporation owned assets in the total value of $5,364,801.04, of which $1,499,902.38

was the equity of its common stockholders. (R. 368-9.) The Samson Tire & Rubber Corporation always carried its own bank accounts and employed its own labor and paid that labor itself. It maintained its own complete set of books and business records, including ledgers and other operating books, covering and reflecting the conduct of its business, like any other large concern. Included in these books and records were asset and liability accounts, pay roll accounts, accounts receivable, accounts payable, cost accounts and inventory accounts. It always rendered its own separate income tax returns. (R. 261-2; 268; 269-272.)

It was this old (actually dating from 1917, while reorganized in 1928), substantial, property-owning, integrated business concern which the Collector of Internal Revenue denied the right to sell its own corporately owned merchandise on June 1, 1932, and whose corporate entity in that connection the Collector disregarded and held for naught.

On May 31, 1932, the Samson Tire & Rubber Corporation owned in its own right a stock of tires and tubes. By adequate and complete bill of sale dated June 1, 1932, it sold that stock outright to the United States Rubber Products, Incorporated, together with all tires and tubes which the vendor might manufacture or acquire from day to day commencing on June 1, 1932, and continuing thereafter until terminated by either party on thirty days' written notice. There were expressly excluded from this bill of sale tires and tubes which the Samson Tire & Rubber

Corporation previously had specifically sold or contracted to sell to customers other than the United States Rubber Products, Incorporated. While the Samson Tire & Rubber Corporation sold a substantial part of its production directly to other dealers and customers, such as the Western Auto Supply Company, a large chain store distributor of automobile accessories and supplies and other merchandise on the Pacific Coast, which always was Samson's own customer, the larger part of its production after 1930 was taken and distributed by the United States Rubber Products, Incorporated. (R. 237-8; 331; 353.)

During 1932 and 1933 the Samson Tire & Rubber Corporation manufactured tires and tubes of *special* brands in the amount of $3,190,742.00. (R. 572.) These were for Western Auto Supply, Montgomery-Ward and Atlas (R. 573), all on the Pacific Coast, and there is no reason to surmise that less than substantially one-third of that amount was business received from Western Auto Supply.

The transfer of tires and tubes made by the bill of sale of June 1, 1932, was regularly entered by the Samson Tire & Rubber Corporation upon its books and records, as a sale properly and usually would be. A complete set of invoices was made in duplicate of which the original set was sent to the United States Rubber Products, Incorporated, at New York and the duplicate set was retained by the Samson Tire & Rubber Corporation at Los Angeles. Accounts receivable were opened on the ledger of the Samson Tire & Rubber Corporation against the United States Rubber Products, Incorporated, in which

accounts the United States Rubber Products, Incorporated, was debited with the full amount of the sale price. At the same time appropriate corresponding entries were made in other accounts on the ledger, such as sales accounts, inventory accounts and cost of sales account. No element of a complete sale was lacking. (R. 272-278; 234-35.) After the bill of sale the Samson Tire & Rubber Corporation exercised no control whatever over the goods, that control passed completely to the vendee. (R. 284.)

The final execution of the bill of sale was in California (Los Angeles) where Samson's plant and offices were located. (R. 14; 457.)

The Samson Corporation (the new company organized in Delaware in December, 1930) never had any assets other than (1) the shares of common stock of the Samson Tire & Rubber Corporation which The Samson Corporation had acquired by the exchange of its own preferred and Class B common shares with the common stockholders of the Samson Tire & Rubber Corporation and (2) the shares of preferred stock (approximately 60,000 shares) of the Samson Tire & Rubber Corporation which The Samson Corporation had purchased for cash. (R. 459.) So obviously the former common stockholders of the Samson Tire & Rubber Corporation who had exchanged their common shares of that corporation for preferred and Class B common shares of The Samson Corporation were dependent for the recovery of their investment solely upon the business success, welfare and solvency of the Samson Tire & Rubber Corporation itself. They thus

still were virtual shareholders of the Samson Tire & Rubber Corporation.

On June 1, 1932, the investment of the independent public in the assets, welfare and earnings of the Samson Tire & Rubber Corporation, which were the sole recourse of those investors, amounted to the following millions:

$57,690.00 in non-convertible preferred stock of the par value (R. 112) of $10.00 per share;

$710.00 in convertible preferred stock of the par value (R. 112) of $10.00 per share;

$45,150.00 in 4515 shares of no par (R. 112) common stock (see R. 358, last line, and R. 369, next to last line reading "Net Worth of Common Stock $1,499,902.38");

$1,417,850.00 representing the public's investment by various persons in 141,785 preferred shares of The Samson Corporation of the par value (R. 207) of $10.00 per share;

(For above stockholdings, see R. 43.)

$810,500.00 principal of debentures outstanding payable only out of earnings and assets of Samson Tire & Rubber Corporation. (R. 185.)

$2,331,900.00 total investment of investing public.

ARGUMENT.

In the petition (p. 7) it is said that "the taxpayer *remained* the *owner*". If *it* (Samson Tire & Rubber Corporation) was the *owner* why could it not sell its *own* property, in a transaction advantageous to it? The only ground alleged for refusing to recognize the sale was that the *vendor* (taxpayer) was so insubstantial that its corporate entity must be brushed aside and its corporate acts held for naught. How could that be if *it* owned the merchandise? Just as it owned the merchandise, so Samson Tire & Rubber Corporation owned in its own right land, buildings, machinery, equipment, raw materials, finished goods, bank and other accounts, which were the sole security and reliance of over two million dollars of public investment. None of that property could be sold or disposed of without the affirmative action and agreement of the Samson Tire & Rubber Corporation itself. And by the same token it could itself sell and give good title to any of said property and merchandise. It was bound, as was also its largest stockholder, to see that its affairs were so conducted that its business was profitable and its assets were conserved, for the benfit of itself and its debenture holders and *all* of its shareholders.

This case is as different as white from black from all of the cases cited at any time in the course of this litigation by the party now petitioner. Constantly we have challenged our opponent to cite a case within the facts at bar, and to this date he has failed to do so.

All of opponent's citations have been and still are of cases wherein a transfer was disregarded and held for naught because the *vendee* was a wholly owned creature of the vendor, organized and existing wholly for the convenience of the vendor and subject wholly to the vendor's whim and caprice, often, also, just organized for the purpose of the transfer, and sometimes then promptly dissolved as in *Gregory v. Helvering*, 293 U. S. 465, cited by the petitioner in the court below. None of these insubstantial corporate vendees involved any outside or public investment interest.

The instant case cannot even by Procrustean violence be tortured to conform to the cases cited by the petitioner. In those cases the transfer was rejected because of the incompetence of the vendee, and so the merchandise remained the property of the vendor who therefore, in excise tax cases, became liable for the tax when the merchandise later was sold to the public. Curiously, at bar, the Collector first ignores the corporate entity of the vendor in order to get rid, as he believes, of the sale and then having, as he thinks, gotten rid of the sale he proceeds to tax the vendor now as the substantial producer and owner of the merchandise.

We do not need to analyze the *Continental Oil* case or the *Griffiths* case or the *Higgins* case, the citations upon which the petitioner relies, further than to say that in the *Higgins* case there was only *one* real person involved who was the sole owner of a corporation and used that corporation for the purpose of making sales by which losses could be ascertained and deducted whenever the conditions

made it advantageous for the taxpayer to pursue that course; that in the *Griffiths* case there was only *one* real person involved who wholly owned and solely controlled a corporation which he caused *at the time* to be organized for the purpose of effecting a transfer of stock from himself to the corporation which then would transfer the stock to a third party for $100,000, which sum the corporation then would pay to the taxpayer in forty annual instalments, the plan being thus to invoke the provision of the income tax act permitting the income tax to be spread over the period of credit where a purchase price was made payable in annual instalments; that in the *Continental Oil* case both vendees were wholly owned and solely controlled subsidiary corporations of Continental Oil Company which could exercise its will over each subsidiary without accountability to any interest whatever other than its own—each subsidiary corporation was a true instance of a mere department or pocket of a parent corporation.

The petitioner definitely is in error in assuming that in any of these cited cases there were "*minority* stockholders * * * involved". (P. pg. 8.)

The June 1st bill of sale was for a substantial consideration, cost plus five per cent, a fixed price payable in any event, notwithstanding market fluctuations in a highly competitive industry, or advancing costs, by a financially responsible vendee. That vendee, in turn, obtained an inventory which, in competition with other distributors, it could sell to the public without the addition of any excise tax. Distributors all over the country were like-

wise protecting themselves. (R. 98.) The manufacturing owner also had a perfect legal right, in addition to other advantages, to protect its financial position for its stockholders and creditors by effecting a tax saving by any regular, open and frank method of merchandising. It acted no differently from innumerable other manufacturers throughout the country. (R. 98.) Its good faith cannot be impugned and there was no fraud or deception involved in its action, and such was not pleaded (R. 27-8), or claimed at the trial. (R. 574.)

There was no reason in law or equity why the Samson Tire & Rubber Corporation should not make an absolute sale of these particular inventories of tires and tubes, even if previously and subsequently it disposed of other stocks of tires and tubes through consignment to the United States Rubber Products, Incorporated, which subjected the vendor (Samson Tire & Rubber Corporation) to all of the caprices of the market in this highly competitive industry.

The Samson Tire & Rubber Corporation retained no control or right to do as it pleased over the goods sold—no control over the disposal, by sale, consignment or otherwise, to dealers or others. Such control and right passed exclusively to the vendee United States Rubber Products, Incorporated. (R. 284.) With the array of findings of evidentiary or probative facts and details as drafted by the defendant in the trial court there is no finding whatever that the vendor did not divest itself completely of all control over the goods sold.

With respect to the Samson Tire & Rubber Corporation itself, the United States Rubber Company as the owner (through subsidiaries) of a majority of the voting stock could not do as it pleased, but was a fiduciary and trustee for the large interests held by independent stockholders and creditors of the Samson Tire & Rubber Corporation. (*Pepper v. Litton,* 308 U. S. 295, at page 306.)

In the cases cited by the petitioner the finding that there was no "business purpose" was founded on the fact that in each of those cases the property continued in the complete control of the vendor through the fact that the vendee was wholly owned and solely controlled by the vendor. As said in *Higgins v. Smith,* the transaction was "a transfer by Mr. Smith's left hand, being his individual hand, into his right hand, being his corporate hand, so that in truth and fact there was no transfer at all". It was on such ground that the court in the *Higgins* case said that the government might look at the actualities and disregard the sale transaction as unreal or a sham. Obviously a sale transaction could not be held to be "unreal or a sham" merely because it operated as a tax saving to the vendor, even if that saving was the primary reason for the vendor's making that sale. At bar, as previously mentioned, no control remained in the vendor Samson Tire & Rubber Corporation.

The respondent has not sought any right or privilege granted by the excise tax act. It has not claimed to have brought itself within any favored class defined by any clause of that act, as the taxpayer in the *Higgins* and the

Griffiths cases did in respect of provisions of the income tax act. In no respect does the respondent invoke the excise tax act.

The respondent never has asked the court to piece-out the sale transaction or to supply elements lacking or to resolve doubts by presumptions in the taxpayer's favor. The steps taken by the respondent were full and sufficient to consummate a sale. All the respondent asks is that its consummated acts shall be given the legal effect to which such acts ordinarily are entitled, that they shall be given their common law effect. In this respect it should be remembered that this sale was made before the effective date of the excise tax act, and when the only law applicable was the common law with the statutes and judicial decisions of California. The law of California was fully complied with, it and the applicable California appellate decisions sustain the sale, as the Circuit Court has declared, properly so as we respectfully submit.

Respectfully we submit that the petition for a writ of certiorari should be denied.

PAUL H. ARTHUR,
of New York,
Rockefeller Center, 1230 6th Ave., New York,
Attorney for Respondent.

Of Counsel:

ERNEST S. WILLIAMS,
of Los Angeles.